(Slip Opinion)

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
Rybond, Inc.	)	RCRA (3008) Appeal No. 95-3
Docket No. RCRA-III-247	)	

[Decided November 8, 1996]

FINAL ORDER

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich and Kathie A. Stein.

RYBOND, INC.

RCRA (3008) Appeal No. 95-3

FINAL ORDER

Decided November 8, 1996

Syllabus

Rybond, Inc. ("Rybond") has appealed a default order issued by an administrative law judge ("ALJ") assessing a penalty against it in the amount of $178,896. The penalty was based on findings by the ALJ that Rybond had committed one violation of regulations implementing the federal Resource Conservation and Recovery Act ("RCRA") and three violations of the Pennsylvania Hazardous Waste Regulations. (While the ALJ found Rybond in violation of all three Pennsylvania regulations, he assessed a penalty for only one of those violations, failure to obtain a permit.) A default order was issued based on Rybond's failure to comply with a previous order issued by the ALJ requiring the submission of a prehearing exchange.

This case arose out of the storage of hazardous wastes by one of Rybond's tenants at a building owned by Rybond. A complaint was issued by U.S. EPA Region III which alleged that Rybond had failed to comply with the applicable Pennsylvania regulations in that: (1) it owned a hazardous waste storage facility without having obtained an appropriate permit; (2) it failed to perform required inspections; and (3) it received hazardous waste for treatment, storage, or disposal without having received an identification number. The Complaint further alleged a violation of the federal RCRA regulation relating to land disposal of hazardous waste.

Rybond filed an Answer to the Complaint denying the violations, and an ALJ was assigned for purposes of conducting a hearing. However, based on Rybond's failure to timely file a prehearing exchange, the ALJ issued the default order without a hearing.

On appeal, Rybond asks the Board to set aside the default order and, in addition, in the alternative, to dismiss the Complaint, reduce the penalty, or remand the matter to the ALJ for a hearing on the merits. Rybond argues that the default order should be set aside because, while Rybond may not have strictly complied with the requirements for a prehearing submission, it was unrepresented by counsel at the time and responded in a manner it thought appropriate. Rybond further argues that it is not liable under the Pennsylvania regulations because they do not impose liability solely on the basis of land ownership. Rybond also asserts that the Region failed to prove the land disposal regulation violation.

Held: The default order was properly issued and Rybond's appeal of the finding of liability is denied. However, the Board concludes that under the totality of the circumstances, a $25,000 penalty is appropriate, rather than the $178,896 civil penalty assessed by the ALJ.

Rybond clearly did not comply with the ALJ's orders for a prehearing exchange. Rybond's contention that it should be excused for failing to comply because it was not represented by counsel at the time these orders were issued lacks merit. Rybond was represented by counsel at the time it filed its Answer. Rybond made a conscious decision to discontinue the services of its lawyer and to appear *pro se*. Rybond has articulated no persuasive reason why it should not bear the consequences of that decision.

Further, even without legal representation, Rybond should have been able to understand what it was required to do to comply with the ALJ's order. Rybond was carefully apprised of the due date and contents of the prehearing exchange, and was given several opportunities to comply. Alternatively, when the ALJ gave Rybond a final extension of time to file its prehearing response, it could have retained counsel to assure compliance with the order or could at least have sought a timely clarification of its obligations under the order. Instead, Rybond submitted a wholly inadequate one-page document falling far short of what was required.

Rybond also argues that it is not liable for the violations and thus has a "meritorious defense" that warrants the setting aside of the default order. As to the three violations of the Pennsylvania regulations, Rybond argues primarily that it is not liable because those regulations do not impose liability on a property owner for hazardous waste stored on its property without its knowledge or consent by a tenant to whom the space is leased. Rybond cites certain decisions of the Pennsylvania Environmental Hearing Board as allegedly supporting its position but those decisions are distinguishable. Rather, based on a thorough review of the applicable law and regulations and federal and Pennsylvania cases, the Environmental Appeals Board concludes that nothing cited by Rybond establishes a meritorious defense to the allegation that it violated the applicable Pennsylvania regulations by failing to obtain a permit for the storage of the waste, the State requirement for which a penalty was actually assessed.

With respect to the federal land disposal restriction violation, the Board rejects Rybond's argument that the Region has not demonstrated the hazardous wastes stored on Rybond's property do not qualify for a small quantity generator exemption. It is not the Region's burden to establish that Rybond did not qualify for a regulatory exemption. It is Rybond's burden to demonstrate that it is exempt from the regulatory requirement.

Similarly, while Rybond argues that the Region failed to prove that the wastes were not stored for the authorized purpose of accumulating waste to facilitate proper recovery, treatment, or disposal, 40 C.F.R. § 268.50(c) places the burden on Rybond to demonstrate that the wastes, which were alleged to have been stored for more than one

year, were stored solely for the purpose authorized by the regulations, and it has failed to meet that burden.

Finally, as to the penalty amount to be assessed, the Board finds that a total penalty of $25,000 is appropriate under the totality of the circumstances of the violations, and that it is consistent with the Agency's overall goals in penalty assessment of "deterrence, fair and equitable treatment of the regulated community, and swift resolution of environmental problems." EPA General Enforcement Policy No. GM-22, at 1 (Feb. 16, 1984).

In particular, the Board recognizes the indirect nature of Rybond's involvement in the violations, the lack of a serious risk to public health or the environment associated with those violations, and the likely significant deterrent effect on Rybond of a penalty substantially smaller than the one assessed by the ALJ as factors that collectively argue for a much reduced penalty in this case.

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich and Kathie A. Stein.

Opinion of the Board by Judge Reich:

Rybond, Inc. ("Rybond") appeals to the Board pursuant to 40 C.F.R. § 22.30(a) from a default order ("Order on Default") issued by Administrative Law Judge Vanderheyden ("ALJ") on August 9, 1995. The Order assesses a total civil penalty against Rybond of $178,896, for one violation of the federal regulations implementing Subtitle C of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6921-6939(e), and three violations of the Pennsylvania Hazardous Waste Regulations, 25 Pa. Code §§ 260-270 ("the Pennsylvania regulations").[1] (While the ALJ found Rybond in violation of all three

[1] *See infra* n.6. The Commonwealth of Pennsylvania received final authorization to administer a hazardous waste management program in lieu of the federal program on January 30, 1986, pursuant to RCRA § 3006(b), 42 U.S.C. § 6926(b), and 40 C.F.R. Part 271 Subpart A. Pennsylvania; Final Authorization of State Hazardous Waste Management Program, 51 Fed. Reg. 1791 (Jan. 15, 1986). EPA still administers those parts of RCRA for which Pennsylvania has not received authorization. EPA also has the authority pursuant to RCRA § 3008(a)(1), 42 U.S.C. § 6928(a)(1), to enforce any requirement of the authorized Pennsylvania program. *See In re CID-Chemical Waste Management of Illinois, Inc.*, 2 E.A.D. 613 (CJO 1988).

Pennsylvania regulations, he assessed a penalty for only one of those violations, failure to obtain a permit.) The ALJ issued the default order pursuant to 40 C.F.R. § 22.17(a) because Rybond had not complied with an order he issued requiring Rybond to file a prehearing submission. [2] Rybond asks the Board to set aside the Order on Default, and, in addition, in the alternative, to dismiss the Complaint, reduce the penalty, or remand the matter to the ALJ for a hearing on the merits. Rybond Appeal Brief at 11-12 and 31. It requests an oral argument on this matter pursuant to 40 C.F.R. § 22.30(d). [3]

As we stated in *In re Thermal Reduction Co., Inc.*:

> When fairness and a balance of the equities so dictate, a default order will be set aside. As a general principle, default orders are not favored and doubts are usually resolved in favor of the defaulting party. When making such a determination, the Environmental Appeals Board will consider the totality of the circumstances presented.

4 E.A.D. 128, 131 (EAB 1992) (citations omitted). In this case, however, after carefully considering Rybond's arguments, we conclude that the Order on Default was properly issued and that Rybond has not demonstrated that it should be set aside. Therefore, we are denying Rybond's appeal to the extent that Rybond appeals the finding of liability. However, we regard the $178,896 civil penalty the ALJ assessed as too high under the circumstances of this case. We are reducing the total penalty to $25,000. We regard that amount as appropriate in relation to the nature and circumstances of the violations and conclude that it will be of sufficient magnitude to deter future violations.

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[2] Section 22.17(a) provides that "[a] party may be found to be in default * * * upon failure to comply with a prehearing or hearing order of the Presiding Officer * * *."

[3] Because the Board does not believe that oral argument would be of material assistance in resolving this matter, Rybond's request for oral argument is denied.

I. BACKGROUND

Rybond owns a building at 840 West Main Street, Lansdale, PA.[4] At the time of the violations, Carl Keyser was the President of Rybond and its sole full-time employee. In 1989, Rybond leased space at 840 West Main Street, where the violations are alleged to have occurred, to Innovative Machine Technology, Inc. ("Innovative"). EPA Region III inspectors conducted a compliance inspection at 840 West Main Street on December 9, 1992, and found two 275-gallon above-ground storage tanks in the space that Rybond had leased to Innovative. They also found approximately thirty-three 55-gallon drums and four 20-gallon containers of liquid coolants, lubricants, paint, cleaning solutions, and various other materials. Based on an analysis of samples the Region took from the 275-gallon tanks during the inspection, the Region determined that the tanks contained a spent halogenated solvent, 1,1,1-trichloroethane, which is defined as a hazardous waste under RCRA. Complaint at § II ¶¶ 2-13.

According to the Complaint,[5] Innovative had operated a machine repair business at another location in Lansdale between 1987 and 1989 and had deposited machine oils from its business operations into tanks during that period. Another company, Precision Rebuilding Corporation, had also operated a machine repair business at that same location between 1963 and 1987, and had placed used Zurnkleen NF, a solvent which contains 1,1,1-trichloroethane, into the same tanks during that time period. The two tanks were moved to Innovative's leased space at 840 West Main Street in June 1991. *See id.* at ¶¶ 3-10. The Region asserts that Innovative operated a machine repair shop at 840 West Main Street between 1989 and 1992, and that, after

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[4]Affidavit of Carl Keyser, President, Rybond, Inc., September 19, 1995. That Affidavit refers to a property at 840 West Main Street while the Complaint refers to a property at 840 Main Street. We assume that the address in the Affidavit is the correct address.

[5]Rybond's default constitutes an admission of the factual allegations of the Complaint for purposes of the pending action. 40 C.F.R. § 22.17(a).

Innovative ceased to operate the machine repair shop, its leased space at 840 West Main Street has been used solely for "the continued storage of materials remaining at the Facility from the [Innovative] operation." *Id*. at ¶¶ 3-4.

The Region filed a five-count Complaint against Rybond and Innovative on September 16, 1993, for alleged violations of RCRA and its implementing federal regulations, and for alleged violations of the Pennsylvania regulations that implement RCRA in Pennsylvania.[6] Subsequent to the filing of the Complaint, the Region withdrew the allegations against Innovative without prejudice, based on its conclusion that Innovative was financially unable to pay a penalty.[7] Order Granting Motion to Dismiss Complaint Without Prejudice, Dec. 1, 1994.

The Complaint alleged that 840 West Main Street is a hazardous waste storage facility because the building at that address had been used since June 1991 to store hazardous wastes in two 275-gallon storage tanks. Complaint at § II ¶¶ 14-15. The Complaint further alleged that Rybond is the owner of 840 West Main Street, and that it

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[6]The regulations were issued pursuant to Sections 401, 403(b)(9) and 501 of the Solid Waste Management Act, 35 P.S. §§ 6018.401, 6018.403(b)(9), and 6018.501.

The Pennsylvania Department of Environmental Resources recodified its hazardous waste regulations subsequent to the issuance of the Complaint. 20 Pa. Bulletin 909 (Feb. 10, 1990). The Region cited the regulations as they originally appeared at 25 Pa. Code §§ 75.259-75.282. The regulations now appear at 25 Pa. Code §§ 260-270. For ease of reference, we will cite the present code section number when discussing these regulations.

[7]Counts I, III, IV and V of the Complaint initially alleged violations by both Rybond and Innovative. These four counts are based on the presence of the two 275-gallon storage tanks. Count II of the Complaint solely alleged a violation by Innovative, based on the presence of "approximately 38 containers of various materials, three partially full degreasing units, and a pile of grey material * * *." Complaint at § II ¶ 25. Since the Region withdrew the charges against Innovative, the ALJ's decision is based on the charges against Rybond in Counts I, III, IV, and V of the Complaint.

had failed to perform certain duties imposed by RCRA and its implementing regulations on owners of hazardous waste storage facilities. *Id.* at ¶¶ 17, 19-22, 31-50.

More particularly, Counts I, III, and V of the Complaint alleged violations of the Pennsylvania regulations. Count I alleged that Rybond violated 25 Pa. Code § 270.1 in that it "owned and/or operated" a hazardous waste storage facility without having first obtained a permit from the Pennsylvania Department of Environmental Protection.[8] *Id.* at ¶ 21. Count III of the Complaint alleged that Rybond violated 25 Pa. Code § 265.195(a) in that it failed to conduct required inspections of two storage tanks containing stored hazardous wastes.[9] *Id.* at ¶ 34. Count V alleged that Rybond violated 25 Pa. Code § 264.11 in that it accepted hazardous waste for treatment, storage or disposal at its facility without having received an identification number.[10] *Id.* at ¶ 50. As for violations of the federal RCRA regulations, Count IV alleged that Rybond violated 40 C.F.R. § 268.50(a)(2):

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[8]Section 270.1, formerly 25 Pa. Code § 75.270, provides that a person may not own or operate a hazardous waste storage facility without first obtaining a permit from the Pennsylvania Department of Environmental Resources (now the Pennsylvania Department of Environmental Protection, "PADEP"). While the Complaint stated in § II. ¶ 21 that "Respondents [Rybond and Innovative] owned and/or operated" the facility, they were actually cited in § II. ¶ 22 as being in violation only for operating, not owning. *See infra* n.21.

[9]Section 265.195(a), formerly 25 Pa. Code § 75.264(r)(8), imposes inspection requirements on owners or operators of facilities that use tanks to treat or store hazardous waste.

[10]Section 264.11, formerly 25 Pa. Code § 75.264(b), provides that:

> A person or municipality who owns or operates a hazardous waste management facility may not accept hazardous waste for treatment, storage or disposal without having received an identification number * * *.

> [B]y storing hazardous waste restricted from land disposal for purposes other than to accumulate such quantities of hazardous waste as necessary to facilitate proper recovery, treatment, or disposal and by failing to mark the two hazardous waste storage tanks with the information specified by 40 C.F.R. § 268.50(a)(2)(i) and (ii).

Complaint at § II. ¶ 44.[11] The Region proposed a total penalty of $178,896, which is the sum of $97,406 for the violation alleged in Count I and $81,490 for the violation alleged in Count IV. It sought no additional penalties for the violations alleged in Counts III and V on the ground that "Counts III and V are * * * violations directly resulting from the failure to obtain a permit as alleged in Count I" and that "the penalty as calculated for Count I alone is sufficient to deter similar future violations." *Id.* at § IV.(a). The Region calculated the penalty amounts for Counts I and IV in accordance with the 1990 Revised RCRA Civil Penalty Policy. Each of the two penalty amounts is the sum of a gravity-based penalty amount based on the "probability of harm" and the "extent of deviation from regulatory requirements" of the violation, a multiday component that reflects the duration of the violation, and an amount that reflects the economic benefit to the violator of its noncompliance.

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[11]Agency regulations at 40 C.F.R. Part 268 Subpart E prohibit the storage of hazardous wastes that are restricted from land disposal unless certain regulatory conditions are met. Specifically, the regulations allow storage of such wastes "solely for the purpose of the accumulation of such quantities of hazardous waste as necessary to facilitate proper recovery, treatment, or disposal * * *." 40 C.F.R. § 268.50(a)(1). The regulations further provide that certain information about the storage tank must either be "clearly marked" on the tank or must be "recorded and maintained in the operating record at that facility." 40 C.F.R. § 268.50(a)(2). The regulations specifically authorize storage for up to one year unless the Agency can show that such storage is not for the purpose of accumulation to facilitate proper recovery, treatment, or disposal. However, if storage extends beyond one year, the burden shifts to the owner/operator to prove that storage was for the purpose allowed by the regulations. 40 C.F.R. § 268.50(c). The Agency has not authorized Pennsylvania to administer these requirements, and therefore the federal regulations apply.

Rybond filed an Answer to the Complaint on November 1, 1993. Rybond admitted that it had owned the property at 840 West Main Street since 1973, and that EPA inspectors had found two 275-gallon tanks and various other containers in Innovative's leased space. Answer at 2 and 3. Rybond denied liability for any of the violations alleged in the Complaint. It contended that it was "not an owner or operator of [a] hazardous waste treatment, storage or disposal facility under RCRA" because its "only relationship with the tenant of the Property, IMT, was that of landlord/tenant." *Id*. at 12. Rybond's Answer raised two additional defenses that apply only to the allegations of Count IV of the Complaint. First, Rybond asserted that the Region had not properly alleged a violation of 40 C.F.R. § 268.50(a)(2) because the Region had not "met its burden of demonstrating that any [storage of hazardous waste] was not solely for the purpose of accumulating such quantities or [sic] necessary to facilitate proper recovery, treatment or disposal." *Id*. at 9. Second, Rybond claimed that it was exempt from the requirements of 40 C.F.R. § 268.50(a)(2) because its tenant Innovative was a "small quantity generator" and therefore the two storage tanks located in Innovative's leased space qualify for a small quantity generator exemption from 40 C.F.R. § 268.50(a)(2) pursuant to 40 C.F.R. § 268.30(a)(1). *Id*. at 8.

On December 10, 1993, after the filing of the Answer, Rybond's counsel moved to withdraw from the proceeding, stating that Rybond had elected to proceed without counsel "on account of the expense associated with the use of outside counsel." Motion to Withdraw from Representation, Dec. 10, 1993. The ALJ granted the motion on February 23, 1994. On April 22, 1994, Mr. Keyser notified the ALJ that he had elected to appear *pro se*, and explained that he had previously failed to respond to the ALJ's order of February 23, 1994, because he had "just returned from [his] winter vacation * * *." [12]

[12]The ALJ's February 23, 1994 order required Rybond to notify him whether it intended to appear *pro se*. When Rybond failed to comply with the February 23, 1994 order, the ALJ issued an Order to Show Cause on April 18, 1994, why an order on default should not be issued.

The ALJ issued an Order on June 17, 1994, requiring the parties to file prehearing submissions by no later than September 9, 1994. The June 17 Order spelled out in detail the information that both Rybond and the Region were required to provide as part of the prehearing exchange. Among other things, it provided that:

> Each party shall make available to the other (a) the names of the expert or other witnesses intended to be called, together with a brief narrative summary of their expected testimony, and the number of exhibits intended to be offered into evidence; (b) copies of all documents and exhibits which each party intends to introduce into evidence * * *.

June 17 Order at 3. At the Region's request, the ALJ issued an order on August 31, 1994, extending the deadline to file the prehearing exchange to October 31, 1994.[13] The Region filed a timely prehearing exchange on that date.

Rybond did not file any response to the June 17, 1994 Order, although Mr. Keyser notified the ALJ by letter of June 24, 1994, that he was taking the Order "along on [his] vacation." On December 27, 1994, the ALJ issued an Order to Show Cause requiring Rybond to show cause why an Order on Default should not be issued pursuant to 40 C.F.R. § 22.17, based on Rybond's failure to comply with the June 17 Order. In response to the December 27 Order to Show Cause, Mr. Keyser sent a letter to the ALJ on January 2, 1995, stating that he had been in Florida from September to mid-December 1994, and that: "I talked to Wendy upon my return and that was the first I knew about an

[13]The Region maintains that it notified Rybond of the extension of the deadline to October 31, 1994, by sending it a copy of a letter it sent to the ALJ confirming his Order granting the extension. *See* Letter from Jean Kane, Region III, to Administrative Law Judge Frank W. Vanderheyden (undated).

October 31 deadline."[14] He stated that he was returning to Florida and that he would be "back in Pennsylvania around the end of March, 1995." He neither requested a further extension of time nor indicated any intention of filing a prehearing exchange in this letter. Nonetheless, based on Mr. Keyser's January 2, 1995 letter, the ALJ issued an order on January 12, 1995, giving Mr. Keyser an additional 30 days from the date of service of the order in which to submit a prehearing exchange. Order Granting Extension to Respondent Concerning Its Submission of Prehearing Exchange, Jan. 12, 1995.

On February 9, 1995, Rybond filed a one-page, double-spaced response to the January 12, 1995 Order, that purported to be Rybond's answer, request for a formal settlement conference, and prehearing exchange. Letter from Carl Keyser to U.S. EPA, Feb. 9, 1995.[15] Rybond denied in the letter that it had ever been a hazardous waste facility. It argued that it should not be responsible for the two tanks because the tanks were transported to 840 West Main Street without Rybond's permission and because EPA "knew about the tanks at least six months prior and done nothing till December 9, 1992." Rybond's February 9, 1995 letter did not identify either the witnesses Rybond planned to call at a hearing or the documents that it intended to produce, as required by the ALJ's prehearing exchange order.

On March 7, 1995, the ALJ issued an Order finding Rybond in default for "fail[ing] to comply with the order of the ALJ for its prehearing exchange," and directing the Region to prepare a draft Order on Default. Rybond hired a new lawyer in April 1995, who obtained permission from the ALJ to file a response to the March 7, 1995 Order. On May 8, 1995, Rybond moved the ALJ to set aside his March 1995

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[14] "Wendy" is presumably Wendy Miller, Senior Assistant Regional Counsel, Region III. Mr. Keyser did not explain in the January 2, 1995 letter why he had not filed Rybond's prehearing submission by the September 9 deadline if he was unaware that the deadline had been extended to October 31.

[15] As previously discussed, Rybond had actually filed an answer on November 1, 1993, but it referred to the February 9, 1995 letter as an "answer" as well.

Order and to allow the case to proceed to a hearing. Motion of Respondent Rybond at 2. In its Motion, Rybond contended that it "did not willfully ignore" the ALJ's order but "merely responded in a manner thought appropriate by a pro se litigant * * *." *Id*. at 6.

The Region filed a response opposing Rybond's motion to set aside the ALJ's March 7, 1995 Order. Response to Rybond, Inc.'s Motion, May 22, 1995. The Region argued that "[Rybond] had established a pattern of failing to respond timely to ALJ orders in this case * * *" (*id*. at 8), and that its "only excuse for the failure to meet deadlines has been that [Keyser] has been out of town vacationing in Florida." *Id*. at 2. The Region asserted that Rybond's "attitude of indifference to the administrative proceedings * * * damages the regulatory program and hinders the RCRA administrative enforcement process."[16] *Id*. at 10.

The ALJ issued an Order on Default on August 9, 1995, pursuant to 40 C.F.R. § 22.17(a), for Rybond's failure to comply with his January 12, 1995 Order requiring a prehearing exchange. Order on Default at 3. He found that the Region's "prehearing exchange documentation is sufficient to establish a prima facie case to support the allegations of the complaint."[17] *Id*. at 10. He stated that he had considered all of the circumstances of the case, including the fact that

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[16]The three orders to which the Region refers are the February 23, 1994 Order requiring Rybond to advise the ALJ if it intended to appear *pro se*; the June 17, 1994 Order requiring Rybond to file a prehearing submission; and the January 12, 1995 Order extending the deadline for Rybond's prehearing submission.

[17]The ALJ made the finding that the Region had established a prima facie case even though the regulations do not require such a finding when a party is found in default after failure to comply with a prehearing order. The regulations provide that "[n]o finding of default *on the basis of a failure to appear at a hearing* shall be made against the respondent unless the complainant presents sufficient evidence to establish a prima facie case against the respondent." 40 C.F.R. § 22.17(a). This was not the basis for the default order here. We have, however, considered issues concerning Rybond's liability in determining whether Rybond has a "meritorious defense," a factor in our determination whether to vacate the default order. *See infra* Section II.B.

Rybond's "only connection to this matter is its ownership of the realty, its good faith efforts to rectify the violations which it did not create, the nature and amount of the penalty, the former pro se status of respondent, and the general principle of resolving cases on their merits." *Id*. at 11-12. However, he concluded that none of those circumstances persuaded him that the default order should not be issued or that a penalty should not be assessed against Rybond. *Id*. He found that Rybond had presented no "meritorious defenses" to the allegations of the Complaint and that it "has demonstrated a contumacious disregard for prior orders of the ALJ." *Id.* at 12. He added that Rybond "elected under its own volition to proceed pro se [and] is the architect of its own legal misfortune." *Id*. The ALJ adopted the Region's rationale for its proposed penalty amount, and assessed a total penalty of $178,896. He concluded that the penalty amount is "consistent with RCRA § 3008(g), 42 U.S.C. §6928(g), and the RCRA Penalty Policy." *Id*. at 13.[18] The ALJ also imposed on Rybond a thirty-day deadline to

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[18]With regard to Counts I, III, and V of the Complaint, the ALJ found that the extent of deviation from the regulatory requirements was "major" in that Rybond had "failed completely" to comply with the requirements. Order on Default at 15. He further determined that:

> Respondent's failure to obtain a permit for the storage of hazardous waste at the facility * * * constituted a moderate potential for harm to the integrity of the RCRA program because the respondent unilaterally precluded its inclusion in the RCRA regulatory universe * * *. When hazardous waste management facilities operate outside the scope of regulatory supervision, there is an increased likelihood that safety considerations will be inadequate.

Id. at 14-15. The ALJ concluded that the Region's classification of the extent of deviation from the regulatory requirements alleged in Count IV was "major" because the regulation prohibits the storage of hazardous waste banned from land disposal and because "the hazardous waste was stored in excess of two years in the tanks at the facility." *Id.* at 18. He found that the violation of Count IV had a "significant" potential for harm to the RCRA program because Rybond has "essentially ignored a significant requirement" of the regulations. *Id.* The ALJ stated that, "while granting a large penalty without a hearing may cause hesitancy, respondent has had countless opportunities, but still fails to provide any documentation concerning an inability to pay the full penalty." *Id*. at 12.

complete "the remaining items required under the compliance order of the Complaint." *Id*. at 20.

Rybond asks the Board to vacate the Order on Default and, in addition, in the alternative, to dismiss the Complaint, reduce the penalty, or remand the matter to the ALJ for a full hearing on the merits. Rybond Appeal at 2-3. It acknowledges that it "may not have adhered strictly to the requirements of a prehearing exchange" but contends that it should be excused from any deficiencies in its response because it was not represented by counsel at the time the ALJ issued the June 17, 1994 and January 12, 1995 Orders requiring it to file prehearing submissions. Appeal Brief at 5. It asserts that it responded "in the manner it thought appropriate as a pro se litigant." *Id*. Rybond argues that it did not violate RCRA as alleged and therefore that it would prevail on the merits if this matter were brought to a hearing. Rybond further contends that even if it had violated RCRA, it should not be subject to any civil penalty because it did not cause the violations and "took steps to remedy after the situation was discovered." *Id*. at 9, n.7.

The Region urges the Board to uphold the Order on Default. It asserts that:

> The ALJ correctly ruled (1) that Rybond failed to rebut its liability established by the Default Order, (2) that Rybond failed to show "good cause" for its failure to submit a Prehearing Exchange, and (3) that considering the facts and circumstances of the case as a whole, including the size of the penalty, Rybond's good faith efforts to comply with the Compliance Order and its status as a pro se litigant, Rybond failed to establish good cause for setting aside the Default Order * * *.

Region's Response at 8-9.

II. DISCUSSION

In evaluating the merits of a petition to vacate a default order, we take "the totality of the circumstances presented" into consideration. *In re Thermal Reduction Co., Inc.*, 4 E.A.D. 128, 131 (EAB 1992). As stated in *In re Midwest Bank & Trust Co., Inc.*, 3 E.A.D. 696 (CJO 1991) (affirming the ALJ's default order):

> [S]etting aside a default order is essentially a form of equitable relief. It is appropriate to examine whether fairness and a balance of the equities dictate that a default order be set aside.

3 E.A.D. at 699 (footnote omitted).[19] These factors and circumstances may include consideration of the likelihood that the action would have had a different outcome had there been a hearing.

In this case, after examining all of the circumstances of this matter, we are not persuaded that there are equitable grounds for vacating the Order on Default. Rybond failed to comply with three separate orders issued by the ALJ. It has provided no adequate justification for failing to comply with any of the Orders. *See* A., *infra*.

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[19] In *Midwest*, the Respondent appealed an ALJ's order denying Respondent's motion to set aside a default order the ALJ had previously issued. Respondent moved to set aside the default order pursuant to 40 C.F.R. § 22.17(d), which provides that "[f]or good cause shown the Regional Administrator or the Presiding Officer, as appropriate, may set aside a default order." EPA's Chief Judicial Officer affirmed the ALJ's determination that Respondent had not demonstrated "good cause" to set aside the default order. We note that Rybond's appeal comes to the Board in a different procedural posture in that Rybond is not appealing the denial of a motion to set aside a default order, but is directly appealing the default order itself as an initial decision pursuant to 40 C.F.R. §§ 22.17(b) and 22.30. Under this circumstance, the Board is not bound by the "good cause" standard in 40 C.F.R. § 22.17(d), which applies to ALJs and Regional Administrators.

We are also not bound by the Federal Rules of Civil Procedure. Therefore, we reject Rybond's argument that we should apply the three part test in Rule 55(c) of the Federal Rules of Civil Procedure: *i.e.*, whether the default was willful, whether setting aside the default could prejudice the plaintiff, and whether the defendant has presented a meritorious defense. *See In re Detroit Plastic Molding Company*, 3 E.A.D. 103, 107 (CJO 1990).

Moreover, it has given us no reason to conclude that it would prevail if the matter were heard on the merits. *See* B., *infra*. Therefore, we affirm the ALJ's Order on Default as to Rybond's liability, although with a significant reduction in the penalty amount.

A. *Rybond's Failure to Comply with the ALJ's Orders Requiring a Prehearing Exchange*

The ALJ issued the Order on Default because Rybond did not comply with his January 12, 1995 Order extending the deadline for Rybond to file its prehearing exchange. As noted *supra*, the ALJ initially issued an order on June 17, 1994, requiring prehearing submissions by September 9, 1994, a deadline that he extended to October 31, 1994, at the Region's request. That Order required both parties to identify the witnesses they planned to call at the hearing and to submit copies of documents and exhibits they intended to introduce into evidence. The Region filed a timely prehearing submission. However, Rybond never provided the information required by the ALJ's Orders, even though the ALJ gave Rybond's president, Mr. Keyser, many opportunities to do so.

When Rybond failed to file any response to the June 17 Order, the ALJ issued a December 27, 1994 Order to Show Cause why a default order should not issue. Mr. Keyser responded to the December 27 Order with a letter stating that he had been unaware of the October 31 deadline because he had been in Florida from September to December 1994. Keyser Letter, January 2, 1995. The letter did not explain what arrangements had been made for Mr. Keyser's receipt of mail during this period or how he attended to legal and business affairs during this period. The letter also gave no explanation for failing to comply with the original June 17 Order before leaving for Florida. Moreover, instead of offering to provide the required documents, Mr. Keyser merely stated in the letter that he was returning to Florida and would be back "around the end of March." Although Mr. Keyser had not requested an extension of time to file prehearing submissions, the ALJ gave Mr. Keyser additional time to file Rybond's prehearing submission. Order Granting Extension to Respondent Concerning Its Submission of Prehearing Exchange, Jan. 12, 1995. Again, Mr. Keyser failed to provide the required documents.

Rybond argues that it should be excused for its failure to comply with the January 12 Order, and that it should be given an

opportunity to litigate this matter on the merits. It argues that it "did not willfully ignore" the Order, and contends that its lack of legal representation should excuse its failure to adhere strictly to the specific requirements of the Order. Rybond Appeal Brief at 11. In its response to Rybond's appeal, the Region urges us to affirm the Order on Default. It argues that "Rybond was carefully apprised of the required due date and contents of the Prehearing Exchange * * * [and] cannot now claim it did not know what was required in a Prehearing Exchange." Region's Response at 17-18. The Region contends that "being a *pro se* litigant is not an excuse for failing to file documents in an administrative proceeding." Region's Response to Rybond's Motion to Set Aside the ALJ's March 7, 1995 Order at 7.

RCRA civil penalty adjudications are governed by regulatory rules of procedure at 40 C.F.R. Part 22 that apply to all litigants, whether they appear *pro se* or are represented by counsel. The Part 22 rules of procedure expressly provide at 40 C.F.R. § 22.17(a) that a party may be found to be in default "upon failure to comply with a prehearing or hearing order of the Presiding Officer." In this case, the ALJ found that Rybond had not complied with his prehearing orders and entered an Order on Default in accordance with the regulations. He rejected Rybond's argument that it should be excused for failing to comply with the Orders.

Rybond's contention that it should be excused for failing to comply with the ALJ's Orders because it was not represented by counsel at the time these Orders were issued lacks merit. Rybond was represented by counsel at the time it filed its Answer. Rybond's president made a conscious decision to discontinue the services of his lawyer and to appear *pro se*. Rybond has given us no persuasive reason why it should not bear the consequences of that decision. It is true that both the federal courts and the Agency have adopted the approach that "more lenient standards of competence and compliance apply to *pro se* litigants." *Hall v. Dworkin*, 829 F. Supp. 1403, 1414 (N.D.N.Y. 1993); *see also In re Occidental Chemical and Agricultural Products*, 2 E.A.D. 30, 33 (JO 1985) ("[A] *pro se* party * * * must be given reasonable latitude in effectuating its intent"); *In re Envotech, L.P.*, 6 E.A.D. UIC

Appeal Nos. 95-2 through 95-37, slip op. at 10 (EAB, Feb. 15, 1996)("[T]he Board endeavors to construe petitions broadly, particularly when they are filed by persons unrepresented by legal counsel * * *."). Nonetheless, a litigant who elects to appear *pro se* takes upon himself or herself the responsibility for complying with the procedural rules and may suffer adverse consequences in the event of noncompliance.

The argument Rybond makes, that lack of legal representation constitutes good cause for vacating a default order, was raised and rejected in *In re House Analysis & Associates & Fred Powell*, 4 E.A.D. 501 (EAB 1993). In that case, as in the instant proceeding, the Board upheld a default order based on a Respondent's failure to respond to the Order for Prehearing Exchange. We noted that "[t]he fact that [respondent], who apparently is not a lawyer, chooses to represent himself and House Analysis & Associates does not excuse respondent from the responsibility of complying with the applicable rules of procedure." 4 E.A.D. at 505. *See also In re Turner Copter Services, Inc.*, 2 E.A.D. 96 (CJO 1985) (rejecting Respondent's argument that the default order should be set aside because the company president had appeared *pro se*). Moreover, we agree with the Region that:

> Rybond was carefully apprised of the required due date and contents of the Prehearing Exchange. Rybond also received EPA's Prehearing Exchange to use as an example. Rybond cannot now claim it did not know what was required in a Prehearing Exchange.

Response at 17-18. The June 17 Order clearly states, among other requirements, that each party shall make available to the other party the names of witnesses and copies of documents. It appears to us that, even without legal representation, Rybond should have been able to understand what it was required to do to comply with the ALJ's Order. Alternatively, when Rybond received a further extension of time to file its prehearing response, it could have retained counsel at that point to assure compliance with the Order or could at least have sought a timely clarification of its obligations under the Order. Rybond's single-page

submission in response to the ALJ's Order requiring it to participate in the prehearing exchange falls so far short of providing the information the ALJ required it to submit that we are not prepared to overlook its deficiencies.

B. ***Rybond's Arguments as to Liability***

Rybond further contends that the Board should set aside the Order on Default because the Complaint and the Region's prehearing exchange do not establish that it violated RCRA and implementing federal and Pennsylvania regulations. Rybond Appeal Brief at 11. It argues that the Agency's Chief Judicial Officer held in *In re Midwest Bank & Trust Co.*, 3 E.A.D. 696, 699-700 n.7 (CJO 1991), that a "meritorious defense" to the allegations of the Complaint may alone provide sufficient justification for setting aside a default order if there is a "strong probability" that litigating the case would produce a different outcome.[20]

As discussed below, we find that Rybond has not demonstrated that there is a strong probability that it would prevail on any of the four counts of the Complaint if the case were heard on the merits. Therefore, we reject Rybond's argument. As noted previously, Counts I, III, and V of the Complaint alleged violations of the Pennsylvania Hazardous Waste Regulations; Count IV alleged a violation of the federal RCRA regulations. We will address Counts I, III and V first.

The violations alleged in Counts I, III and V of the Complaint are all based on the Region's contention that Rybond is the owner of a facility that was used to store hazardous waste within the meaning of

[20]While much of Rybond's argument is framed in terms of the Region's alleged failure to establish a prima facie case, as we previously noted the ALJ actually has no obligation to make a finding of a prima facie case where the default is based on the failure to comply with a prehearing order. *See supra* n.17. Thus, we will consider Rybond's arguments only as they relate to the existence of a "meritorious defense" under *Midwest Bank & Trust*.

RCRA and the Pennsylvania regulations that implement RCRA Subtitle C in that State; and that Rybond did not comply with certain regulatory requirements imposed by the Pennsylvania regulations on owners of such facilities.[21] As explained more fully below, since Rybond *is* the owner of a facility that was used to store hazardous waste, within the meaning of the Pennsylvania regulations, and since Rybond does not contend that it performed the particular duties imposed by the regulations on owners of facilities used to store hazardous waste that are referred to in the Complaint, we conclude that Rybond does not have a meritorious defense to Counts I, III, and V.

The Pennsylvania regulations define "facility" broadly to include "[c]ontiguous land, and structures, other appurtenances, and improvements on the land, used for treating, storing or disposing of hazardous waste." 25 Pa. Code § 260.2. Rybond's property at 840

[21]We note that the Complaint misstates the violations in two respects, as noted below. We are overlooking these pleading deficiencies since we find that the Complaint gave Rybond "fair notice of the charges against it." *See In re Asbestos Specialists, Inc.*, 4 E.A.D. 819, 826 (EAB 1993). Therefore, because Rybond had fair notice, it was not prejudiced by the errors. *See also In re Spang & Co.*, 6 E.A.D. EPCRA Appeal Nos. 94-3 & 94-4, slip op. at 10 (EAB 1995) (holding that a pleading error was "considered harmless and will be overlooked" where the Respondent "has not asserted any prejudice" resulting from the error).

First, Count I alleged that Rybond violated 25 Pa. Code § 270.1 "by operating a hazardous waste storage facility without a permit" when it should have alleged that Rybond violated the regulation by "owning" such a facility. *See* Complaint at § II. ¶ 22. We note, however, that the Complaint elsewhere alleged that Rybond is the "owner" of a facility (*Id.* at ¶ 2) and further alleged that the regulations provide that no person may "own" a hazardous waste storage facility without first obtaining a permit (*Id.* at ¶ 21). Moreover, Rybond asserted in its Answer that it was neither the "owner" nor the "operator" of a hazardous waste storage facility. Therefore, it was not prejudiced by the assertion that the violation was for "operating" rather than "owning" the facility.

Second, Count III inaccurately paraphrased 25 Pa. Code § 265.195(a) when it alleged that the regulation imposes certain obligations on the "owner or operator of a hazardous waste storage tank." The regulation, read in conjunction with 25 Pa. Code § 265.190(a), imposes such obligations on the owner or operator of a "facility" that uses tanks to store hazardous waste.

West Main Street is a "facility" under that definition in that it contains a structure that was used to store "hazardous wastes" in two 275-gallon storage tanks.[22] Rybond acknowledges that it is the owner of 840 West Main Street.[23] Therefore, Rybond is the owner of a facility that was used to store hazardous waste under the Pennsylvania regulations.

Rybond's principal basis for contending it is not liable is its assertion that the hazardous waste was stored on the property without Rybond's knowledge or consent by the tenant to whom the space was leased. Rybond argues that a property owner is not liable in such circumstances. Rybond Appeal Brief at 12-13. We can find nothing either in the applicable Pennsylvania statute or in the regulatory language at issue to support Rybond's argument. The applicable Pennsylvania regulation is clear and unambiguous on its face. 25 Pa. Code § 270.1 expressly provides:

> A person or municipality may not *own or operate* a hazardous waste storage, treatment or disposal facility unless the person or municipality has first obtained a permit for the facility from the department * * *. (Emphasis added.)

Virtually identical language appears in Section 401 of the Pennsylvania Solid Waste Management Act (SWMA), 35 P.S. § 6018.401, on which the regulation is based.

> [N]o person or municipality shall *own or operate* a hazardous waste storage, treatment or disposal facility

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[22]The Complaint alleged that the two storage tanks contained a spent halogenated solvent, 1,1,1-trichloroethane, which bears the hazardous waste identification number "F001." Complaint at § II. ¶ 13. The ALJ made a finding that the substance in the two storage tanks was a "hazardous waste." Order on Default at 5. That finding was not challenged on appeal.

[23]An "owner" is defined by regulation as "the person or municipality who is the owner of record of all or part of a facility." 25 Pa. Code § 260.2.

> unless such person or municipality has first obtained a permit for the storage, treatment and disposal of hazardous waste from the department.

Thus, based on a review of the applicable regulation and statute we can find no basis for upholding Rybond's argument. [24] To the contrary, by their terms the laws apply to owners as well as operators. Our interpretation that the Pennsylvania regulations apply to owners of facilities that store hazardous waste is supported by a Legal Statement from Pennsylvania's Deputy General Counsel, with a concurrence letter from the First Deputy Attorney General, which accompanied Pennsylvania's request to EPA that it be authorized to carry out the RCRA Subtitle C program in that State. The Pennsylvania Legal Statement, a required component of the State's request for authorization to administer the federal RCRA program,[25] states that the Pennsylvania program "like RCRA, requires that *owners* and operators of treatment, storage, and disposal facilities obtain permits and operate in compliance with them." Pennsylvania Legal Statement at 13, October 4, 1985 (emphasis added).

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[24]The only count against Rybond under Pennsylvania law for which the Region sought and the ALJ assessed a penalty was Count I, for owning a hazardous waste storage facility without having the required permit. Since no penalty was sought for Counts III and V, we do not need to address these counts further. We note, however, that Counts III and V also were based on provisions of Pennsylvania law which by their terms apply to both owners and operators. *See* 25 Pa. Code § 264.11 ("A person or municipality who *owns or operates* a hazardous waste management facility may not accept hazardous waste for treatment, storage or disposal without having received an identification number from the Department".) (emphasis added); 25 Pa. Code § 265.190(a) ("This subchapter applies to *owners and operators* of facilities that use tanks to * * * store hazardous waste * * *".) (emphasis added); 25 Pa. Code § 265.195(a) ("The *owner or operator* shall inspect * * *".) (emphasis added).

[25]RCRA expressly provides that a State program may not be authorized if the Administrator finds that the program "is not equivalent to the Federal program * * *." 42 U.S.C. § 6926(b). 40 C.F.R. § 271.7 requires the Attorney General of a State that seeks authority to carry out a RCRA Subtitle C program to submit a statement that the laws of the State meet the Agency's regulatory requirements. This statement may also be provided by an attorney for a State agency with independent counsel.

Our conclusion that owners of facilities that store hazardous waste must obtain permits is fully consistent with federal law and the cases decided thereunder. For example, the Agency rejected an argument that an owner was not liable under RCRA in *In re Arrcom, Inc., Drexler Enterprises, Inc.*, 2 E.A.D. 203 (CJO 1986). Similar to Rybond, in *Arrcom* an owner/lessor of commercial property, which was leased to a tenant storing used oil and solvent on the leased premises, argued that it was not the owner of a facility that was used to store hazardous waste under the federal regulations that implement RCRA. The definition of "facility" in the federal regulations at 40 C.F.R. § 260.10 is identical to the definition in the Pennsylvania regulations at 25 Pa. Code § 260.2. The owner and its tenant were both assessed civil penalties for failure to obtain a RCRA permit. On appeal, the Agency's Chief Judicial Officer upheld the penalty assessment against the owner of the property, holding that "the owner of a facility at which hazardous waste is stored is subject to RCRA and may be held accountable for its violation." 2 E.A.D. at 208. The Chief Judicial Officer noted that the statute "expressly directs EPA to hold property owners responsible for hazardous waste activities conducted on their property," *id*. at 211, and he further stated that "RCRA does not link the duty to obtain a RCRA permit to the extent of the owner's knowledge or control of the facility." *Id*. at 207.

The Board cited the *Arrcom* decision in *National Cement Company of California, Inc.*, 5 E.A.D. 415, 422 (1994), Order vacated and remanded on other grounds, *Systech Environmental Corp. v. U.S. EPA*, 55 F.3d 1466 (9th Cir. 1995), [26] in which we held that:

> Owners of facilities are required to have permits. This is true even for "absentee owners" * * * who have nothing to do with the operation of the facility.

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[26]The Court of Appeals for the Ninth Circuit upheld the Board's interpretation of RCRA that absentee landlords are "owners" of hazardous waste facilities under RCRA and "must have permits." 55 F.3d at 1469. Because it disagreed with the Agency's interpretation of the certification requirements at 40 C.F.R. § 270.11(d), it remanded the matter for the Agency to process National Cement's permit application.

5 E.A.D. at 422 (footnotes omitted). *See also In re Waste Technologies Industries, East Liverpool, Ohio,* 4 E.A.D. 106, 109 (EAB 1992) ("[L]andowners as well as tenant-operators are each required to have a permit."); *In re Ford Motor Co.*, 3 E.A.D. 677, 679-682 (Adm'r 1991); *In re Hawaiian Western Steel, Ltd., and James Campbell Estate*, 2 E.A.D. 675, 680 (Adm'r 1988)("Notice is not a prerequisite to liability for failure to obtain a permit under RCRA").

In the face of clear federal law and applicable State laws and regulations, Rybond nonetheless argues that it is not subject to the Pennsylvania regulations because its "sole nexus to this matter is by mere ownership of property in a landlord/tenant relationship." Rybond Appeal Brief at 12.[27] It asserts that "mere ownership of property is not enough to trigger liability" under the Pennsylvania regulations. *Id*. at 13. Notably, Rybond does not cite or make reference to any language in the Pennsylvania regulations that excludes owners in a landlord/tenant relationship from responsibility for obtaining a permit for a hazardous waste storage facility. Further, Rybond's brief contains no reference at all either to the regulatory language or to judicial or administrative decisions interpreting the RCRA hazardous waste Subtitle C regulations. Instead, Rybond relies entirely on several decisions of the Pennsylvania Environmental Hearing Board ("EHB") and the Pennsylvania Commonwealth Court, involving challenges to orders issued by the Pennsylvania Department of Environmental Resources ("DER").[28]

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[27] *See supra* n.24 and accompanying text. As previously noted, Count IV of the Complaint is based solely on the federal regulations and would not be implicated by this argument. *See supra* n.11 and accompanying text.

[28] It is unclear how much deference the Board should give to the EHB and Commonwealth Court decisions. *Cf. In re Ina Road Water Pollution Control Facility*, 2 E.A.D. 99, 101 n.7 (CJO 1985) (The Agency can, in appropriate circumstances, substitute its interpretation of a State's water quality standard regulations in place of the State's interpretation). However, we need not reach that issue since the decisions cited by Rybond do not support the legal arguments it urges upon the Board.

As discussed below, most of the decisions cited by Rybond are not on point because they do not interpret the specific Pennsylvania regulations at issue here. They principally either involve solid rather than hazardous waste, or the scope of DER's authority to order cleanup of contamination rather than the obligation imposed by the regulations on an "owner" of a facility to obtain a permit for the storage of hazardous waste. As to the one decision of the EHB cited by Rybond that does construe the specific statutory provision at issue here, we find that that decision does not support Rybond's argument.

Rybond's brief places greatest weight on two decisions: *Lawrence Blumenthal v. DER*, 1990 EHB 187 (March 6, 1990), and *Lawrence Blumenthal v. DER*, 1992 EHB 135 (Oct. 26, 1992). Rybond Appeal Brief at 13-16. The EHB held in these decisions that a landowner was not responsible for cleaning up contamination he did not cause solely by virtue of his ownership of the property. The Region argues that "*Blumenthal* and the related cases cited by Rybond are readily distinguishable because they do not construe the regulations Rybond is charged with in the instant Complaint, the Pennsylvania Hazardous Waste Management Regulations and the federal land disposal regulations." Response at 13.

We agree that the *Blumenthal* decisions are distinguishable and thus do not compel the conclusion that Rybond is not liable for any of the violations of the Pennsylvania regulations. In the 1990 *Blumenthal* decision, the EHB addressed the question of whether DER had the authority under the SWMA to order Mr. Blumenthal, who did not cause the contamination, to clean up lead contamination based solely on his ownership of the property. Noting that DER's cleanup order was based solely on the SWMA, and not on section 316 of the Clean Streams Law (which confers power on DER to order cleanups but unlike the SWMA contains language applying expressly to "landowner[s]"), the EHB in *Blumenthal* concluded that DER lacked such authority under the

SWMA.[29] Although the EHB made passing reference to the fact that section 401 of the SWMA was mentioned in DER's briefs, *Blumenthal* contains no analysis of section 401 and the regulations thereunder, which are the key provisions at issue here, and section 401 was not relevant in that case.[30] Instead, *Blumenthal* involved DER's

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[29]The breadth of the following statement in the 1990 *Blumenthal* decision provides colorable support for Rybond's position:

> [T]he Department is not authorized by the Solid Waste Management Act to assign responsibility based solely upon the Petitioner's ownership of the land on which the pollution exists.

1990 EHB at 197. However, elsewhere in the decision, the EHB states its legal conclusion far more narrowly, demonstrating that the statutory authority under consideration is DER's authority to issue cleanup orders under the SWMA, which of course is not the statutory authority at issue in the instant proceeding:

> Furthermore, Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S. § 6018.101 *et seq.* (SWMA), does not authorize DER to order a person to clean up hazardous waste contamination solely on the basis that he owns the land on which the hazardous waste is situated.

1990 EHB at 190. *See also id.* at 191. This and similar statements are directly relevant to the facts of the case before the EHB in *Blumenthal*, involving an order to clean up contamination. We believe the broader statements in *Blumenthal* which purport to characterize the SWMA must be read in the context of the issues presented in that case. Even if such statements had been intended to apply more broadly, they are dicta and not persuasive as applied to the requirement for owners to obtain permits for the storage of hazardous waste, which obligation is expressly provided by statute.

[30]In support of its position in *Blumenthal*, the EHB quotes from *DER v. O'Hara Sanitation Co.*, 128 Pa. Commw. 47, 562 A.2d 973 (Pa. Commw. Ct. 1989), the only court case cited to us by Rybond on this issue. In *O'Hara*, the court concluded that the SWMA was not violated, and went on in dictum to note that had it concluded otherwise it would still have stricken the O'Haras as defendants because the DER relied only on the fact that they owned the land at the time of the hearing. "In doing so DER disregarded the requirements of the Act's provisions. DER offered no evidence that the O'Haras had any knowledge of the operations occurring on their land, that the operations did or may

(continued...)

discretionary order authority under section 602 of the SWMA, 35 P.S. § 6018.602, which, unlike section 401 of the SWMA (and 25 Pa. Code § 270.1), does not expressly mention owners. Rather, section 602 authorizes DER to "issue orders to such persons * * * *as it deems necessary* to aid in the enforcement of the provisions of the [SWMA]." 35 P.S. § 6018.602 (emphasis added). [31]

In our view, the difference in the two statutory provisions is significant. By reason of the language of section 602, the EHB was necessarily construing whether the DER was properly exercising its discretion when it issued a cleanup order to a person whose only connection to the waste was the person's ownership of the land on which the hazardous waste was situated. The EHB manifestly concluded that it was not, and held that the DER lacked the authority to issue cleanup orders to such persons. In other cases, where the owner's relationship to the waste was not passive, the EHB has concluded that the owner of the land is a proper subject of a DER cleanup order. *Alpen Properties Corporation v. DER*, EHB Docket No. 90-414-E (August 16, 1993) (discussed *infra*). In the case of section 401, there is no element of discretion in the provision, which unambiguously declares that "persons" are forbidden from "own[ing]" land on which hazardous

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[30](...continued)
constitute dumping of *solid waste* or storage treatment or processing of *solid waste*, or that the O'Haras had given OSC any permission to undertake such operations." *Id.* at 976-77 (footnote omitted) (emphasis added).

The violations at issue in O'Hara involved the processing of and other requirements for solid waste, not hazardous waste. Significantly, the solid waste permitting requirement in *O'Hara* under section 501(a) of the SWMA contains no express reference to an "owner" of a facility. In contrast, section 401 of the SWMA expressly applies to hazardous waste and is applicable to any person who "own[s] or operate[s]" a facility. Furthermore, section 501(c), like section 401, makes clear that any person "owning or operating" a facility for the storage of hazardous waste must notify DER of such activities and no such hazardous waste may be stored unless such notification has been given.

[31] Significantly, the provisions of section 401 of SWMA and 25 Pa. Code § 270.1 are more akin to the provisions of section 316 of the Clean Streams Law than to section 602 of the SWMA in that they apply on their face to owners.

waste is situated "unless" they have first obtained a permit. Given this distinction between the two provisions, we are unwilling to accept *Blumenthal* as authority for the proposition that, under the SWMA, passive landowners are not required to obtain permits for hazardous waste stored on their land.

Another case relied upon by Rybond is *Alpen Properties Corporation v. DER*, EHB Docket No. 90-414-E (August 16, 1993). In *Alpen*, a purchaser who had acquired title to real property from a bankrupt estate was ordered by DER to clean up drums left on the property, have waste sampled, submit a plan for proper disposal, and after DER approval, to implement the plan. The drums had been discovered by one of Alpen's contractors while cleaning up and improving the site, in preparation for renting it to a tenant. In the context of discussing DER's authority to order a landowner to clean up contamination on his property, the EHB in *Alpen* cited *Blumenthal* with approval. More particularly, it stated in discussing *Blumenthal*:

> The Petition was granted because the SWMA does not authorize DER to issue Orders holding a person liable to clean up a site solely on the basis of his ownership of property. We affirm that position in this adjudication just as Commonwealth Court did in *O'Hara*. Nothing in the SWMA allows DER to impose liability for these drums solely on Alpen's ownership of this site.

Alpen, slip op. at 12-13. As previously discussed, the issue of DER's authority to order an owner to clean up contamination is a far different issue than whether an owner is required by the applicable regulations to obtain a permit.

Significantly, in a later and separate portion of the decision, the EHB makes clear that section 401 of the SWMA requires that Alpen obtain a permit. The EHB stated:

> With regard to any portion of these materials which were hazardous wastes, * * *, their storage is governed by Section 401 of the SWMA (35 P.S. § 6018.401).

> Section 401 prohibits storage contrary to the rules and regulations. It goes on to require persons who operate hazardous waste storage facilities to first obtain a DER permit for that facility.

Id. at 18. It further stated that:

> Clearly, we must also reject Alpen's argument that it needs no permits to dispose of or store wastes at its property. Insofar as Alpen is storing or disposing of hazardous wastes at the site, Section 401 of the SWMA mandates that Alpen possess a permit for hazardous waste storage and disposal operations.

Id. at 20. Thus, we find unpersuasive Rybond's argument that *Alpen* somehow stands for the proposition that an owner need not obtain a permit for storage of hazardous wastes. Although this aspect of *Alpen* is not fully dispositive of the question before this Board because the EHB seems to presume that Alpen was the operator as well as the owner of the facility, the discussion shows that the storage violations and permitting requirements under section 401 were considered separately from the cleanup analysis under Blumenthal. *See also* Conclusion of Law # 10, *id*. at 24.[32]

It is useful at this point to remember the context in which the issue of Rybond's liability is being considered. It is relevant solely for the purpose of deciding whether Rybond has such a compelling argument of a "meritorious defense" that the Board should consider

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[32]We recognize that the EHB decision in *Alpen* is not entirely clear, and that one could argue that it can be read to support the position being suggested by Rybond. We find such a reading of the decision to be unpersuasive, however, because it is flatly inconsistent with the text of the Pennsylvania regulation itself, 25 Pa. Code § 270.1, and section 401 of the Pennsylvania SWMA. We note also that *Alpen*, based on our review, has not been cited by other courts or in subsequent EHB decisions. We therefore interpret and distinguish it as described in the text above and decline to reach a different result in this case on the basis of this decision.

vacating the default order on that basis alone. In that context, it is Rybond's burden to establish that it clearly has a meritorious defense.

Based on a thorough review of the applicable law and regulations and federal and Pennsylvania cases, we conclude that nothing cited by Rybond establishes a meritorious defense to the allegations that it violated the applicable regulations by failing to obtain a permit for the storage of the waste.

Rybond raises an additional argument that pertains solely to Count V of the Complaint. As stated *supra*, Count V alleges that Rybond violated 25 Pa. Code § 264.11, which provides that "[a] person * * * who owns or operates a hazardous waste management facility may not accept hazardous waste for treatment, storage or disposal without having received an identification number from [DER]." Rybond alleges that it could not have "accepted" the waste in the storage tanks because it was unaware of the existence of the tanks. Rybond Appeal Brief at 21. We need not address Rybond's contention because the Region did not recommend, and the ALJ did not assess, a civil penalty for the violation.

Rybond further argues that the Region has not established a violation of the federal regulations at 40 C.F.R. § 268.50(a)(2), as alleged in Count IV of the Complaint. As stated *supra*, the regulation prohibits the storage of hazardous wastes restricted from land disposal except under specified conditions. The Region alleges that Rybond violated the regulatory prohibition because hazardous wastes were stored at its facility for more than two years and because the circumstances under which they were stored did not meet the regulatory conditions. Specifically, the Region contends that Rybond did not sustain its burden of proving that the hazardous wastes were stored for the authorized purpose of "the accumulation of such quantities of hazardous waste as necessary to facilitate proper recovery, treatment, or disposal." The Region further contends that the storage tanks were not marked with "a description of its contents, the quantity of each hazardous waste received, and the date each period of accumulation

begins," nor was the required information maintained in the facility's operating record, as required by 40 C.F.R. § 268.50(a)(2)(ii).

Rybond responds to the Region's arguments by first contending that it is not the owner of a facility that was used to store hazardous waste within the meaning of the federal regulations implementing RCRA. We have already addressed this argument and concluded it lacked validity. Second, Rybond argues that the Region has not demonstrated that any hazardous wastes stored at 840 West Main Street do not qualify for a small quantity generator exemption from the storage prohibition in the regulations, based on the contention that Rybond's tenant, Innovative, is a small quantity generator. We reject this argument because it is not the Region's burden to establish that Rybond did not qualify for a regulatory exemption. Rather, it is Rybond's burden to demonstrate that it is exempt from the regulatory requirement.[33]

Third, Rybond argues that the Region failed to prove that the wastes were not stored for the authorized purpose of accumulating waste to facilitate proper recovery, treatment, or disposal. Where hazardous wastes are stored for longer than one year, the regulations explicitly place on the facility owner and operator the burden of proving that the hazardous wastes were stored "solely for the purpose of the accumulation of such quantities of hazardous waste as necessary to facilitate the proper recovery, treatment, or disposal." 40 C.F.R. § 268.50(c). In this case, the Region alleged in its Complaint that the hazardous wastes were stored for more than one year. Rybond forfeited its opportunity to demonstrate otherwise when it failed to comply with the prehearing exchange orders. Its default constitutes an admission of that factual allegation. *See* 40 C.F.R. § 22.17(a). Therefore, it is

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[33] "Generally, a statutory exception (or exemption) must be raised as an affirmative defense, with the burden of persuasion and the initial burden of production upon the party that seeks to invoke the exception." *In re Standard Scrap Metal Company*, 3 E.A.D. 267, 272 n.9 (CJO 1990), citing *U.S. v. First City National Bank of Houston*, 368 U.S. 361, 366 (1967)(a "party that 'claims the benefits of an exception to the prohibition of a statute' carries the burden of proving that it falls within the exception.").

Rybond's burden to demonstrate that the wastes were stored solely for the purpose authorized by the regulations, and it has failed to meet that burden. In any event, Rybond does not contend that it complied with the requirement to mark the tanks or maintain records with the required information.

Finally, Rybond argues that it should not be held liable for any of the alleged violations because it was unaware that any hazardous waste was being stored on its property and made good faith efforts to dispose of the hazardous wastes as soon as it was notified of the existence of the storage tanks. Rybond's argument is to no avail. "RCRA is a remedial strict liability statute which is construed liberally." *U.S. v. Production Plated Plastics, Inc.*, 742 F. Supp. 956, 960 (W.D. Mich. 1990), *aff'd*, 955 F.2d 45 (6th Cir. 1992). *See also In re Humko Products, An Operation of Kraft, Inc.*, 2 E.A.D. 697, 703 (CJO 1988)("RCRA is a strict liability statute, however, and authorizes the imposition of a penalty even if the violation is unintended"). The alleged violations are based on Rybond's ownership of the property at 840 West Main Street and not on any affirmative misconduct on its part. Therefore, its lack of knowledge of the existence of the storage tanks is not a defense to the allegations of the Complaint.

For the same reason, Rybond's efforts to bring its facility into compliance upon notification of the existence of the tanks, while commendable, do not constitute a defense to the allegations of the Complaint. However, as discussed in greater detail below, in determining an appropriate penalty amount for Rybond's violations, we have taken into account the fact that Rybond's liability is based on its status as a property owner rather than on allegations of affirmative misconduct on its part, and any good faith efforts it made to comply once it learned of the violations.

C. *Penalty Amount*

Pursuant to 40 C.F.R. § 22.31(a), the Board can increase or decrease a penalty on appeal except that in the case of a default order, the Board may not increase the penalty. In this case, we are exercising

that authority and reducing the total penalty assessed by the ALJ from $178,896 to $25,000. We find that a total penalty of $25,000 is appropriate under the totality of the circumstances of the violations, and that it is consistent with the Agency's overall goals in penalty assessment of "deterrence, fair and equitable treatment of the regulated community, and swift resolution of environmental problems." EPA General Enforcement Policy No. GM-22, at 1 (Feb. 16, 1984).

The statute provides that, in assessing a civil penalty under RCRA, the Board, as the Administrator's delegatee, "shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements." RCRA § 3008(a)(3), 42 U.S.C. § 6928(a)(3). The Board often relies on Agency penalty policies as a framework for its exercise of discretion. However, penalty policies are in no sense binding on the Board. *See In re Johnson Pacific, Inc.*, 5 E.A.D. 696, 702 n.11 (EAB 1995)(EAB is not bound by FIFRA penalty guidelines); *In re Pacific Refining Co.*, 5 E.A.D. 607, 618 (EAB 1994) (EAB is not bound by EPCRA penalty guidelines). Rather, "we are free to allow for additional penalty reductions in appropriate circumstances based on a full consideration of the statutory penalty factors." *Pacific Refining*, 5 E.A.D. at 618. Under the circumstances of a given violation, reduction of a penalty assesment may be appropriate even if the penalty has been properly calculated in accordance with the Penalty Policy. *See, e.g., In re James C. Lin and Lin Cubing, Inc.*, 5 E.A.D. 595, 602 (EAB 1994) (holding that the assessed penalties were "excessive" even though they were assessed in accordance with the Penalty Policy).

It is an express statutory objective of RCRA to "assur[e] that hazardous waste management practices are conducted in a manner which protects human health and the environment." 42 U.S.C. § 6902(a)(4). To that end, the Agency was directed by Congress to promulgate regulations "applicable to owners and operators of facilities for the tratment, storage, or disposal of hazardous waste * * *." 42 U.S.C. § 6924.

As discussed previously, Rybond is an owner of such a facility and is liable for violations of the regulatory requirements by virtue of that status. Nevertheless, taking into account the statutory factors, we find persuasive Rybond's argument that its penalty for these violations should reflect the fact that its involvement in these violations was indirect. We recognize that Rybond is a small company and that it had leased space at 840 West Main Street not only to Innovative but also to more than a dozen other tenants. Moreover, although Rybond was presumably aware that Innovative was operating a machine repair business on the premises,[34] Rybond asserts (and the Region does not dispute) that it was unaware of the presence of the two storage tanks in Innovative's leased space until EPA conducted its inspection. Appeal Brief at 13 and 19. While these circumstances do not excuse its violations, they collectively argue for a much reduced penalty amount in this case. Moreover, "the extent of environmental threat [posed by a violation] may also make a violation less grave." *In re Brewer Chemical Corp.*, 1 E.A.D. 247, 250 (Adm'r 1976). Both the ALJ and the Region concluded that none of these violations posed a risk of serious harm either to public health or to the environment. The Region characterized the violations as having "relatively low potential for health and environmental harm * * *" in its Civil Penalty Worksheet. The ALJ also observed in his decision that the likelihood of actual harm to human health or the environment from the violations was small. He noted that the potential for harm from the three violations stemming from Rybond's failure to obtain a RCRA permit (as alleged in Counts I, III and V) was "somewhat mitigated by the relatively small volume of waste stored and the good condition of the tanks." Order on Default at 15. He found that the potential for harm from the violation alleged in Count IV was also "relatively small because there was a relatively small amount of waste stored in the two tanks, the two tanks were secured within a building which was locked, there were no apparent

[34]Rybond admits in its Answer that Innovative "has operated a machine repair shop at the Property since 1989." Answer at 2. We note that Rybond's corporate address, as shown on its letterhead (*see, e.g.*, Exhibit A to Rybond Appeal Brief), is the same as the facility address (840 West Main Street), which increases the likelihood that it was aware of what was going on at the facility.

leaks in the tanks, and there was an impermeable floor beneath the tanks." *Id.* at 17.

We recognize that certain violations may "have serious implications and merit substantial penalties where the violation undermines the statutory or regulatory purposes or procedures for implementing the RCRA program," even absent a significant threat of environmental harm. *See* 1990 Revised RCRA Penalty Policy at 14. In this case, the ALJ concluded that Respondent's failure to obtain a permit (as alleged in Count I of the Complaint) had a "moderate potential for harm to the integrity of the RCRA program" and that Respondent's failure to comply with the the Federal Land Disposal Restriction Regulations at 40 C.F.R. § 268.50 (as alleged in Count IV) had a "significant" potential for harm to that program. Order on Default at 15 and 17. Although the $25,000 penalty we are assessing is substantially lower than the amount assessed by the ALJ, we consider a penalty of $25,000 as a penalty of significant magnitude under the circumstances of this case to adequately reflect the potential harm to the Agency's program.[35]

Additionally, as noted *supra*, "a primary purpose of civil penalties is deterrence." *In re Sav-Mart, Inc.*, 5 E.A.D. 732, 738 (1995). Rybond asserts that upon learning of the "alleged violations," it "worked cooperatively with EPA" to dispose of the hazardous wastes. Although any good faith efforts to comply after a violation has been discovered typically do not constitute a basis for reducing a penalty

[35]In a recent decision, *In re Everwood Treatment Company, Inc.*, 6 E.A.D. RCRA (3008) Appeal No. 95-1 (EAB, Sept. 27, 1996), the Board substantially increased the penalty assessed by the ALJ because the ALJ failed to consider harm to the RCRA program in assessing a penalty. The Board also rejected the ALJ's finding of "good faith attempts to comply," finding instead that the penalty should be increased based on "willfulness." The facts in *Everwood Treatment* were very different from those in the instant case, involving the deliberate (even evasive) burial of hazardous waste without a permit and in violation of the land disposal restrictions. In reducing the penalty here based on the unique circumstances of this case, we do not intend to suggest that operation of a hazardous waste facility without a permit is not a serious violation of the law warranting substantial penalties.

amount under the RCRA Penalty Policy,[36] Rybond's efforts provide some evidence that under the circumstances of this case a substantially reduced penalty amount is appropriate and will be sufficient to deter Rybond from future violations.[37]

III. CONCLUSION

For the reasons set forth above, the Order on Default is affirmed as to liability and Rybond is assessed a civil penalty of $25,000.

Payment of the full amount of the penalty assessed shall be made by forwarding a cashier's or certified check, payable to the

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[36]The Penalty Policy states that:

> Under § 3008(a)(3) of RCRA, good faith efforts to comply with applicable requirements must be considered in assessing a penalty. The violator can manifest good faith by promptly identifying and reporting noncompliance or instituting measures to remedy the violation before the Agency detects the violation.
>
> * * *
>
> EPA will * * * apply a presumption against downward adjustment [of a gravity-based penalty] for respondent's efforts to comply or otherwise correct violations after the Agency's detection of violations * * * since the amount set in the gravity-based penalty component matrix assumes good faith efforts by a respondent to comply after EPA discovery of a violation.

1990 Revised RCRA Civil Penalty Policy at 33.

[37]"A civil penalty must provide a meaningful deterrence without being overly punitive; it should be large enough to hurt; it should deter anyone in the future from showing a similar lack of concern with compliance." *United States v. Environmental Waste Control, Inc.*, 710 F. Supp. 1172, 1244 (N.D. Ind. 1989), *aff'd*, 917 F.2d 327 (7th Cir. 1990), *cert. denied*, 495 U.S. 975 (1991). We have no doubt that even a reduced penalty will still "hurt."

Treasurer of the United States, to the following address within sixty (60) days of the date of this decision:

EPA - Region III
Regional Hearing Clerk
P.O. Box 360515M
Pittsburgh, PA 15251

A transmittal letter identifying the subject case and the EPA docket number, plus respondent's name and address must accompany the check. Failure on the part of respondent to pay the penalty within the prescribed statutory time frame after the entry of the final order may result in assessment of interest on the civil penalty (31 U.S.C. § 3717; 4 C.F.R. § 102.13).

So ordered.[38]

[38] It is unclear from the record before us whether Rybond has any outstanding obligations under the compliance order portion of the Order on Default. To the extent that any such obligations do remain, Rybond shall comply with them within 30 days of the date of service of this Order.